RHB BANK BHD v. WONG KOK LEONG & WONG KOK SUN & ANOR

FEDERAL COURT, PUTRAJAYA
ZULKEFLI AHMAD MAKINUDIN CJ (MALAYA)
AHMAD MAAROP FCJ
ABU SAMAH NORDIN FCJ
RAMLY ALI FCJ
ZAHARAH IBRAHIM FCJ
[CIVIL APPEAL NO: 02(f)-99-12-2014(A)]
12 APRIL 2017

LAND LAW: *Caveats – Lien-holder's caveats lodged against several pieces of land – Application for declaration that any action to enforce lien-holder's caveats barred by limitation – Whether limitation relied upon as cause of action – Whether limitation could be used as ground to obtain court order to remove lien-holder's caveat under s. 331(4) of National Land Code – Whether O. 83 of Rules of the High Court 1980 applicable – Whether there was basis for order for cancellation of lien-holder's caveats*

CIVIL PROCEDURE: *Declaration – Application for – Lien-holder's caveats lodged against several pieces of land – Application for declaration that any action to enforce lien-holder's caveats barred by limitation – Whether limitation relied upon as cause of action – Whether limitation could be used as ground to obtain court order to remove lien-holder's caveat under s. 331(4) of National Land Code – Whether O. 83 of Rules of the High Court 1980 applicable – Whether there was basis for order for cancellation of lien-holder's caveats*

CIVIL PROCEDURE: *Action – Cause of action – Limitation – Whether relied upon as cause of action – Lien holder's caveats lodged against several pieces of land – Application for declaration that any action to enforce lien-holder's caveats barred by limitation – Whether limitation could be used as ground to obtain court order to remove lien-holder's caveat under s. 331(4) of National Land Code – Whether O. 83 of Rules of the High Court 1980 applicable – Whether there was basis for order for cancellation of lien-holder's caveats*

The first plaintiff was the administrator for the estate of Wong Kwong Wah (deceased) and the second plaintiff was the administrator *de bonis non* of the estate of Shaikh Mohamed Shaik Bakhu (deceased). Wong was the registered proprietor of a parcel of land, Lot 839, whilst Shaikh was the registered proprietor of Lots 837 and 841 ('parent titles') situated in Tapah, Perak. On 14 March 1981, a joint venture agreement was entered into by Wong and Shaikh ('registered proprietors') with Teng Kong Enterprise Sdn Bhd ('Teng Kong') to develop the parcels of land held under the parent titles into a housing estate. The registered proprietors had created first legal charges over their respective property in favour of the defendant bank ('defendant') as security for bridging loan facilities granted to Teng Kong. On 26 March

1986, the parent titles which were in the lawful custody of the defendant were surrendered to the State Authority for the realienation of the land held under the parent titles by way of the issuance of 413 individual subdivided titles, with the understanding that those individual titles which were not redeemed would be deposited with the defendant as security for the outstanding bridging loan. Those titles were so deposited. In 1987, Teng Kong abandoned the housing development scheme and the joint venture agreement between the registered proprietors and Teng Kong was terminated. Teng Kong defaulted on the loan repayments to the defendant. Consequently, the defendant terminated the loan and filed a suit against Teng Kong for the outstanding amount under the loan. On 30 January 1989, an agreement was entered into between a third party contractor, Pembinaan Fiba Sdn Bhd ('Fiba'), the registered proprietors and the Dravadian Society to rehabilitate and complete the abandoned housing development. An irrevocable power of attorney was given by the registered proprietors to Balachandran Kandasamy ('Balachandran'). On 31 May 1989, the defendant obtained judgment against Teng Kong in the sum of RM428,503.97. On 11 April 1990, the defendant, pursuant to the request of Balachandran, entered lien-holder's caveats under the National Land Code ('NLC') on the individual titles in the defendant's possession belonging to the registered proprietors. On 11 August 2010, the plaintiffs filed this originating summons No. 24-1161-2010 ('OS 1161') for, *inter alia*, a declaration that any action by the defendant to enforce lien-holder's caveats lodged against several parcels of land owned by the plaintiffs was barred by limitation, and for the cancellation of those caveats. The High Court dismissed OS 1161 and held that limitation could not be used as a cause of action. Aggrieved by the decision, the plaintiffs appealed to the Court of Appeal. The Court of Appeal, in allowing the plaintiffs' appeal, held that in the circumstances of this case, the lien-holder's caveats were no longer sustainable, and therefore the caveats must be removed and the titles returned to the plaintiffs. The defendant applied for leave to appeal to the Federal Court on the following question of law: 'Could a landowner rely on laches and limitation as a cause of action or ground to obtain a court order to remove the lien-holder's caveat under s. 331(4) of the National Land Code instead of applying for redemption under O. 83 of the Rules of the High Court 1980 ('the RHC') when the equitable chargee has been paying the quit rent to preserve the lands from forfeiture'.

Held (allowing appeal with costs)
Per Zaharah Ibrahim FCJ delivering the judgment of the court:

(1) In this case, limitation was not being relied upon as a defence by the parties. The plaintiffs were contending that they were entitled to have the lien-holder's caveats removed because the defendant would be barred by limitation should it seek to recover the outstanding amount of the loan by enforcing its rights under the lien-holder's caveats.

Limitation was being used by the plaintiffs as a basis to seek the declaration in para (a) of their OS, which would in turn constitute the justification of their application in para (b) for the cancellation of the lien-holder's caveats. Without a doubt, the plaintiffs were relying upon limitation as a cause of action. This court, however, agreed with the decision in *Sakapp Commodities* that limitation could not be used as a cause of action. (paras 55 & 56)

(2) A registered proprietor whose land was the subject matter of a lien-holder's caveat was entitled to apply under sub-s. 331(4) of the NLC to have the caveat removed if the ground for such application fell within the ambit of that subsection. If the plaintiffs had failed to obtain the declaration they sought to obtain under para (a) of OS 1161, the basis for their application in para (b) did not exist. The court would be left with no basis to find that the caveats ought to have been withdrawn. This court was unable to find the basis for the order for the cancellation of the lien-holder's caveats. Fifty four titles were still held by the defendant as security for the outstanding amount of Teng Kong's loan, for which judgment had been obtained but not fully satisfied. The defendant's lien (which had enabled it to enter the lien-holder's caveats under subs. 330(1) of the NLC) therefore still continued. (paras 69-78)

(3) This court was of the view that it only needed to answer the first part of the leave question, on whether a registered proprietor could rely on limitation as a cause of action or ground to obtain a court order to remove the lien-holder's caveat under s. 331(4) of the NLC. The answer was in the negative. Further, O. 83 of the RHC was of no relevance to this case. The order of the Court of Appeal was therefore set aside. (paras 86 & 87)

Bahasa Malaysia *Headnotes*

Plaintif pertama adalah pentadbir estet Wong Kwong Wah (si mati) dan plaintif kedua adalah pentadbir *de bonis non* estet Shaikh Mohamed Shaikh Bakhu (si mati). Wong adalah pemilik berdaftar sebidang tanah, Lot 839, sementara Shaikh adalah pemilik berdaftar Lot-lot 837 dan 841 (hak milik induk) yang terletak di Tapah, Perak. Pada 14 Mac 1981, satu perjanjian usaha sama dimasuki oleh Wong dan Shaikh ('pemilik-pemilik berdaftar') dengan Teng Kong Enterprise Sdn Bhd ('Teng Kong') bagi membangunkan tanah-tanah yang dipegang bawah hak milik induk menjadi estet perumahan. Pemilik-pemilik berdaftar mewujudkan caj-caj perundangan pertama atas tanah masing-masing memihak kepada defendan bank ('defendan') sebagai sekuriti untuk kemudahan pinjaman sambungan yang diberi kepada Teng Kong. Pada 26 Mac 1986, hak milik induk yang berada dalam jagaan sah defendan diserahkan kepada Pihak Berkuasa Negeri untuk pengasingan semula tanah yang dipegang bawah hak milik induk melalui pengeluaran 413 hak milik individu yang dibahagikan, dengan pemahaman bahawa kesemua

hak milik individu yang tidak ditebus akan didepositkan kepada defendan sebagai sekuriti untuk pinjaman sambungan tertunggak. Hak milik tersebut itu telah didepositkan kesemuanya. Pada tahun 1987, Teng Kong meninggalkan pemajuan perumahan dan perjanjian usaha sama antara pemilik-pemilik berdaftar dan Teng Kong dibatalkan. Teng Kong gagal membuat bayaran pinjaman kepada defendan. Defendan membatalkan pinjaman dan memfailkan guaman terhadap Teng Kong untuk jumlah tertunggak bawah pinjaman. Pada 30 Januari 1989, satu persetujuan dimasuki antara kontraktor pihak ketiga, Pembinaan Fiba Sdn Bhd ('Fiba'), pemilik-pemilik berdaftar dan Dravadian Society untuk menghidupkan dan menyiapkan pembangunan perumahan yang terbengkalai itu. Satu surat kuasa wakil yang tidak boleh dibatalkan diberi oleh pemilik-pemilik berdaftar kepada Balachandran Kandasamy ('Balachandran'). Pada 31 Mei 1989, defendan memperoleh satu penghakiman terhadap Teng Kong berjumlah RM428,503.97. Pada 11 April 1990, defendan, atas permintaan Balachandran, memasukkan kaveat pemegang lien bawah Kanun Tanah Negara ('KTN') hak milik terhadap individu dalam milikan defendan kepunyaan pemilik-pemilik berdaftar. Pada 11 Ogos 2010, plaintif-plaintif memfailkan saman pemula No: 24-1161-2010 ('SP 1161') untuk, antara lain, deklarasi bahawa apa-apa tindakan oleh defendan untuk menguatkuasakan kaveat pemegang lien yang dikemukakan terhadap beberapa bidang tanah milik plaintif-plaintif dihalang oleh had masa, dan untuk pembatalan kaveat-kaveat itu. Mahkamah Tinggi menolak SP 1161 dan memutuskan had masa tidak boleh digunakan sebagai kausa tindakan. Terkilan dengan keputusan tersebut, plaintif-plaintif merayu ke Mahkamah Rayuan. Mahkamah Rayuan, dalam membenarkan rayuan plaintif-plaintif, memutuskan bahawa berdasarkan keadaan dalam kes ini, kaveat pemegang lien tidak lagi mampan, dan dengan itu kaveat-kaveat harus dibatalkan dan semua hak milik dikembalikan kepada plaintif-plaintif. Defendan memohon kebenaran untuk merayu kepada Mahkamah Persekutuan atas persoalan undang-undang 'Bolehkah seorang pemilik tanah bergantung pada kelengahan dan had masa sebagai kausa tindakan atau alasan untuk memperolehi perintah mahkamah bagi membatalkan kaveat-kaveat pemegang lien bawah s. 331(4) Kanun Tanah Negara daripada memohon penebusan bawah A. 83 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') apabila pemegang gadaian saksama telah membayar cukai tanah untuk memelihara tanah daripada pelucuthakan'.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Zaharah Ibrahim HMP menyampaikan penghakiman mahkamah:

(1) Dalam kes ini, pihak-pihak tidak bergantung pada had masa sebagai pembelaan. Plaintif-plaintif menghujahkan bahawa mereka berhak membatalkan kaveat pemegang lien kerana defendan akan dihalang oleh had masa jika ingin menuntut jumlah tertunggak pinjaman dengan menguatkuasakan haknya bawah kaveat pemegang lien. Had masa digunakan oleh plaintif-plaintif sebagai asas untuk menuntut deklarasi

dalam perenggan (a) SP mereka, yang akan menjustifikasikan permohonan mereka dalam perenggan (b) bagi pembatalan kaveat pemegang lien. Tidak diragui, plaintif-plaintif bergantung pada had masa sebagai kausa tindakan. Mahkamah ini, walau bagaimanapun, bersetuju dengan keputusan *Sakapp Commodities* bahawa had masa tidak boleh digunakan sebagai kausa tindakan.

(2) Pemilik berdaftar yang tanahnya membentuk hal perkara kaveat pemegang lien berhak memohon bawah sub-s. 331(4) KTN untuk membatalkan kaveat jika alasan permohonan tersebut terjumlah dalam skop subseksyen tersebut. Jika plaintif-plaintif gagal memperoleh deklarasi yang dituntut bawah perenggan (a) SP 1161, dasar permohonan mereka dalam perenggan (b) tidak wujud. Mahkamah ditinggalkan tanpa dasar untuk memutuskan kaveat harus ditarik balik. Mahkamah ini tidak dapat mencari asas bagi perintah pembatalan kaveat-kaveat pemegang lien. Lima puluh empat hak milik dipegang oleh defendan sebagai sekuriti untuk jumlah tertunggak pinjaman Teng Kong, yang penghakimannya telah diperolehi tetapi tidak dipenuhi sepenuhnya. Oleh itu, lien defendan (yang membolehkannya memasukkan kaveat pemegang lien bawah sub-s. 330(1) KTN) masih berterusan.

(3) Mahkamah ini hanya perlu menjawab bahagian pertama soalan undang-undang yang dikemulakan iaitu sama ada pemilik berdaftar boleh bergantung pada had masa sebagai kausa tindakan untuk memperoleh perintah mahkamah membatalkan kaveat pemegang lien bawah s. 331(4) KTN. Jawapan dijawab secara negatif. Selanjutnya, A. 83 KMT tidak relevan pada kes ini. Perintah Mahkamah Rayuan harus diketepikan.

Case(s) referred to:

ARRM Arunasalam Chetty Son Of Sithambaram Chetty v. Teah Ah Poh Trading Under The Style Of Mun Seng Hin Kee; Teah Soo Chew Trading Under The Style Of Teah Chin Seng [1936] 1 LNS 80 ***(refd)***

Bennett v. White [1910] 2 KB 643 ***(refd)***

Board of Trade v. Cayzer, Irvine & Co [1927] AC 610 ***(refd)***

Eng Mee Yong & Ors v. Letchumanan [1979] 1 LNS 18 PC ***(refd)***

Goh Joon v. Kerajaan Negeri Johor & Ors [1999] 5 CLJ 335 HC ***(refd)***

Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd [2011] 1 CLJ 285 CA ***(refd)***

Hock Hua Bank Bhd v. Leong Yew Chin [1987] 1 CLJ 126; [1987] CLJ (Rep) 126 SC ***(refd)***

Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals [2008] 2 CLJ 121 FC ***(refd)***

Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor [2008] 1 CLJ 651 CA ***(refd)***

Insun Development Sdn Bhd v. Azali Bakar [1996] 2 CLJ 753 SC ***(refd)***

Lembaga Kumpulan Wang Simpanan Pekerja v. Ong Lian Chee [2010] 5 CLJ 23 CA ***(refd)***

Letang v. Cooper [1965] 1 QB 232 ***(refd)***

Loh Wai Lian v. SEA Housing Corp Sdn Bhd [1984] 2 CLJ 160; [1984] 1 CLJ (Rep) 223 FC ***(refd)***

Mohamed Yusop Abdul Wahab v. American Express (M) Sdn Bhd [2002] 7 CLJ 81 HC ***(refd)***
Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***
New Zealand Insurance Co Ltd v. Ong Choon Lin [1992] 1 CLJ 44; [1992] 1 CLJ (Rep) 230 SC ***(refd)***
Newacres Sdn Bhd v. Sri Alam Sdn Bhd [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321 SC ***(refd)***
Perwira Habib Bank Malaysia Bhd lwn. Loo & Sons Realty Sdn Bhd & Anor (No. 2) [1996] 4 CLJ 179 CA ***(refd)***
Read v. Brown [1888] 22 QBD 128 ***(refd)***
Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham [1998] 4 CLJ 812 CA ***(foll)***
Sayang Plantation Bhd v. Koh Siak Poo [2006] 1 CLJ 1163 CA ***(dist)***
Tenaga Nasional Berhad v. Kamarstone Sdn Bhd [2014] 1 CLJ 207 FC ***(refd)***
The Great Eastern Life Assurance Co Ltd v. Indra Janardhana Menon [2005] 4 CLJ 717 FC ***(refd)***
Tuan Haji Ishak Ismail & Ors v. Leong Hup Holdings Bhd And Other Appeals [1996] 1 CLJ 393 FC ***(refd)***

Legislation referred to:
Limitation Act 1953, s. 21
National Land Code, ss. 281(2), 322(2), (3), (4), (5), 326(1B), 328(1), 330(1), (5), 331(4)
Rules of the High Court 1980, O. 83

Other source(s) referred to:
Stroud's Judicial Dictionary, 5th edn, p 378

For the appellant - Navit Kaur Randhawa & Anit Kaur Randhawa; M/s Asbir Hira Singh & Co
For the respondents - GK Ganesan, Selvanathan, Malliga, KN Geetha, An Goh & CC Lam; M/s Malliga & Assocs

[Editor's note: For the Court of Appeal judgment, please see Wong Kok Leong & Anor v. RHB Bank Berhad [2014] 1 LNS 1092 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Zaharah Ibrahim FCJ:

Introduction

[1] This is an appeal by the appellant (who was the defendant in the High Court) against the decision of the Court of Appeal which allowed the appeal by the respondents (who were the plaintiffs in the High Court) against the decision of the High Court dismissing the respondents' application for a declaration that any action by the appellant to enforce lien-holder's caveats lodged against several parcels of land owned by the respondents was barred by limitation, and for the cancellation of those caveats.

[2] In this judgment, the parties will be referred to as they were in the High Court.

Background Facts

[3] This case has a fairly long history. To appreciate what led to this case being filed by the plaintiffs, the background facts need to be set out in some detail.

[4] The first plaintiff is the administrator for the estate of Wong Kwong Wah (deceased).

[5] The second plaintiff is the administrator *de bonis non* of the estate of Shaik Mohammed a/l Shaik Bakhu (deceased).

[6] Wong Kwong Wah was the registered proprietor of that parcel of land being Lot 839, whilst Shaik Mohamad a/l Shaik Bakhu was the registered proprietor of Lots 837 and 841, held under EMR 4501, EMR 890 and EMR 892 respectively ("parent titles"), situated in the Mukim of Batang Padang, in the District of Tapah, in the State of Perak.

[7] On 14 March 1981, a joint venture agreement was entered into by Wong Kwong Wah and Shaik Mohamad a/l Shaik Bakhu ("registered proprietors") with Teng Kong Enterprise Sdn Bhd ("Teng Kong") to develop the parcels of land held under the parent titles into a housing estate known as Taman Tapah Baru.

[8] To finance the housing development, the registered proprietors created first legal charges over their respective property in favour of the defendant (then known as United Malayan Banking Corporation Berhad) as security for bridging loan facilities granted to Teng Kong.

[9] On 26 March 1986, the parent titles which were in the lawful custody of the defendant were surrendered to the State Authority for the re-alienation of the land held under the parent titles by way of the issuance of 413 individual subdivided titles, with the understanding that those individual titles which were not redeemed would be deposited with the defendant as security for the outstanding bridging loan. Those titles were so deposited.

[10] In 1987, Teng Kong abandoned the housing development scheme. The joint venture agreement between the registered proprietors and Teng Kong was terminated on 29 November 1988.

[11] Teng Kong defaulted on the loan repayments to the defendant. Consequently, the defendant terminated the loan and filed suit No. D3-22-95-1989 against Teng Kong for the outstanding amount under the loan. In that action, the registered proprietors were not named as parties.

[12] On 30 January 1989, an agreement was entered into between a third party contractor, Pembinaan Fiba Sdn Bhd ("Fiba"), the registered proprietors and the Dravadian Society to rehabilitate and complete the abandoned housing development. An irrevocable power of attorney was given by the registered proprietors to Balachandran a/l Kandasamy ("Balachandran"), a director of Fiba.

[13] On 31 May 1989, the defendant obtained judgment against Teng Kong in suit No. D3-22-95-1989 for the sum of RM428,503.97 with further interests and costs. On 9 June 1989, Teng Kong was wound up.

[14] On 11 April 1990, the defendant, pursuant to the request of Balachandran (in his capacity as attorney for the registered proprietors), entered lien-holder's caveats under the National Land Code ("NLC") on 72 individual titles in the defendant's possession belonging to the registered proprietors. These are the balance of individual titles that had not been redeemed. Balachandran requested that lien-holder's caveats be entered on the titles instead of legal charges because in his view, it would save the financially-strapped development from having to pay the stamp fees and other legal costs and fees.

[15] Between 11 April 1990 and 15 June 1992, 18 individual titles were redeemed upon payment by Fiba leaving the defendant bank with 54 titles over which it still had lien-holder's caveats.

[16] On 31 January 1991, a proof of debt general form for RM448,602.05 was filed by the defendant with Teng Kong's liquidator, the official assignee (now the Director-General of Insolvency). On 22 August 1997, Shaikh Mohamad a/l Shaik Bakhu died.

[17] On 25 February 1998, Originating Summons No. 24-127-1998 ("OS 24-127-1998") was filed by the registered proprietors seeking, *inter alia*, to redeem the 54 titles from the defendant for the sum of RM58,212.05, which they claimed to be the outstanding amount due to the defendant. The defendant, however, claimed that the actual outstanding amount was RM317,404.27.

[18] On 4 November 1998, the High Court dismissed OS 24-127-1998 with costs. The effect of the proof of debt general form in relation to the lien-holder's caveats was dealt with by the learned High Court Judge in his judgment.

[19] The plaintiffs appealed to the Court of Appeal against the dismissal of OS 24-127-1998. The defendant filed a cross-appeal, seeking to vary the High Court order to an order declaring the outstanding amount to be RM317,404.27. This was the amount found by the High Court to be still owing at that point in time.

[20] On 10 June 2004, the Court of Appeal dismissed the appeal and cross-appeal.

[21] On 11 June 2004, the day after the dismissal of the appeal by the Court of Appeal, the defendant filed Originating Summons No. 24-803-2004 in the Ipoh High Court applying for an order for sale of the parcels of land held under the titles which are the subject matter of the lien-holder's caveats. The plaintiffs opposed the application on the ground that no judgment had been obtained.

[22] By letter dated 11 January 2007, the plaintiffs' solicitors wrote to the defendant's solicitors offering to redeem all of the 54 titles for the redemption sum of RM100,000. This was not accepted by the defendant.

[23] On 4 February 2010, Originating Summons No. 24-803-2004 was struck out.

At The High Court

[24] On 11 August 2010, Wong Kwong Wah and Jamayah binti Haji Osman (as administrator of the estate of Shaikh Mohamad a/l Shaik Bakhu) filed this Originating Summons No. 24-1161-2010 ("OS 1161").

[25] For reasons that will be apparent later, the reliefs prayed for by the plaintiffs in OS 1161 (as amended on 27 April 2011) are set out *verbatim* below:

> (a) satu **pengisytiharan** bahawa **tiada tindakan undang-undang boleh dimulakan** oleh pihak Defendan untuk mendapat kembali kehutangan terhadap pihak Plaintif-plaintif **berdasar kepada Kaveat Pemegang Lien** yang dimasukkan oleh pihak Defendan dan didaftarkan di pejabat Pendaftar Hakmilik Tanah Negeri Perak pada 11-4-1990 melalui Perserahan No: 1924/90 Jilid: 651 Folio: 69 terhadap tanah-tanah yang dimiliki oleh pihak Plaintif Pertama seperti diperihalkan di dalam Jadual "A" yang dilampirkan di sini dan melalui Perserahan No: 1925/90 Jilid: 651 Folio: 70 terhadap tanah-tanah yang dimiliki oleh pihak Plaintif Kedua seperti diperihalkan di dalam Jadual B yang dilampirkan di sini, kesemuanya di Mukim Batang Padang. Daerah Tapah. Negeri Perak Darul Ridzuan ["Kaveat Pemegang Lien tersebut"] **dan/atau untuk melaksanakan Kaveat Pemegang Lien tersebut memandangkan pembatasan masa di sisi undang-undang**. [emphasis added]
>
> (b) Kaveat Pemegang Lien yang dimasukkan oleh pihak Defendan dan didaftarkan di pejabat Pendaftar Hakmilik Tanah Negeri Perak pada 11-4-1990 melalui Perserahan No: 1924/90 Jilid 651 Folio: 69 terhadap tanah-tanah yang dimiliki oleh pihak Plaintif Pertama seperti diperihalkan di dalam Jadual "A" yang dilampirkan di sini dan melalui Perserahan No: 1925/90 Jilid: 651 Folio: 70 terhadap tanah-tanah yang dimiliki oleh pihak Plaintif Kedua seperti diperihalkan di dalam Jadual B yang dilampirkan di sini.

kesemuanya di Mukim Batang Padang. Daerah Tapah. Negeri Perak Darul Ridzuan ["Kaveat Pemegang Lien tersebut"] hendaklah dibatalkan;

(c) pihak Defendan hendaklah dalam jangkamasa dua (2) minggu. setelah disampaikan dengan sesalinan Perintah yang dibuat atas permohonan tersebut di atas bagi pembatalan Kaveat Pemegang Lien tersebut yang dimasukkan oleh pihak Defendan yang didaftarkan di pejabat Pendaftar Hakmilik Tanah Negeri Perak Darul Ridzuan pada 11-4-1990 itu mengembalikan salian ASAL surat ikatan hakmilik kepada tanah-tanah yang dimiliki oleh pihak Plaintif Pertama seperti diperihalkan di dalam Jadual "A" di sini dan tanah-tanah yang dimiliki oleh pihak Plaintif Kedua seperti diperihalkan di dalam Jadual B di dalam ini, kesemuanya di Mukim Batang Padang, Daerah Tapah, Negeri Perak Darul Ridzuan kepada Tetuan Malliga & Associates, Peguamcara bagi pihak Plaintif Pertama dan pihak Plaintif Kedua di tindakan ini;

(d) pihak Pendaftar Hakmilik atau Pentadbir Tanah, Negeri Perak Darul Ridzuan menurut keadaanya, hendaklah dengan serta-mertanya setelah disampaikan dengan sesalinan Perintah yang dibuat atas permohonan tersebut di atas bagi pembatalan Kaveat Pemegang Lien tersebut yang dimasukkan oleh pihak Defendan yang didaftarkan di pejabat Pendaftar Hakmilik Tanah Negeri Perak Darul Ridzuan pada 11-4-1990 itu membuat satu catitan kemasukan dan memorial dalam daftar dokumen hakmilik mengenai pembatalan Kaveat Pemegang Lien tersebut mengenai tanah-tanah berkenaan tersebut di atas yang dimiliki oleh pihak Plaintif Pertama dan Plaintif Kedua masing-masing;

(e) suatu Perintah hendaklah diperbuatkan oleh Mahkamah yang mulia ini mengenai gantirugi yang dialami oleh pihak Pertama atau pihak Plaintif Kedua masing-masing atau sesiapa atau mana-mana badan berkenaan;

(f) suatu tarikh perbicaraan di hadapan Timbalan/Penolong Kanan Pendaftar untuk penetapan gantirugi yang dialami oleh pihak Plaintif Pertama atau pihak Plaintif Kedua masing-masing atau sesiapa atau mana-mana badan berkenaan hendaklah ditetapkan;

(g) fee peguamcara, kos dan perbelanjaan di dalam ini dan bersampingan dengannya yang dikehendaki dibayar oleh pihak Plaintif Pertama dan pihak Plaintif Kedua itu hendaklah ditanggung, digantirugi dan dibayar oleh pihak Defendan kepada pihak Plaintif Pertama dan pihak Plaintif Kedua;

(h) relif-relif yang lain atau lanjut sebagaimana yang difikir sesuai dan sepatutnya oleh Mahkamah yang mulia ini.

(The underlined portions denote the amended parts of the OS)

[26] On 25 August 2010, Wong Kwong Wah, the first plaintiff died. His sons, Wong Kok Leong and Wong Kok Sun, were substituted in place of their father as first plaintiff.

[27] On 2 September 2011, Jamayah binti Haji Osman died. Alias bin Shaik Mohd and Shahrom bin Mohamad, the sons of Shaik Mohamad a/l Shaik Bakhu, were substituted in place of their mother as second plaintiff.

[28] On 20 January 2012, the High Court dismissed OS 1161 with costs. The learned Judicial Commissioner held that the Court of Appeal's decision in *Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham* [1998] 4 CLJ 812; [1998] 4 MLJ 651 ("*Sakapp Commodities*"), that limitation cannot be used as a cause of action, was binding on him.

At The Court Of Appeal

[29] Aggrieved by the decision by the High Court, the plaintiffs appealed to the Court of Appeal.

[30] On 25 February 2014, the Court of Appeal, after hearing the parties, allowed the plaintiffs' appeal. In so doing, the Court of Appeal allowed paras. (b), (c) and (d) of OS 1161.

[31] The Court of Appeal held that the rights of a lien-holder to foreclose under the NLC only arises once judgment has been entered against the debtor. The Court of Appeal noted, in para. 7 of its judgment, as follows:

> What is important to note is that the respondent must comply with section 281 and crystallise his cause of action by filing a suit and obtain a judgment and if necessary proceed with foreclosure proceedings as set out in 281 NLC [sic]. If he fails to do so and/or if limitation has set in section 331 will become applicable to provide relief on the facts of this case. And section 328(1) of NLC states that a private caveat shall lapse at the expiry of 6 years from the time it was lodged. In *Sayang Plantation Bhd v. Koh Siak Pao* [2006] 1 CLJ 1163, the Court of Appeal had this to say:
>
> > Since a lien-holders caveat has the like effect to that of private caveat, the effect of a private caveat would also apply with equal force to a lien-holders caveat.

[32] On the issue of limitation being not applicable except when relied upon as a defence, the Court of Appeal was of the view that *Sakapp Commodities* is not relevant as the plaintiffs in this case "was not pursuing a cause of action" against the defendant. We reproduce below the relevant portions of the Court of Appeal's judgment.

> [11] In the instant case, we do not think *Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham* [1998] 4 CLJ 812 case is relevant. The appellants in the instant case need not seek any declaration to get the lien-holder's caveat removed and obtain the title to the relevant properties. The limitation

issue will only apply to the respondent as we have stated earlier in respect of ss. 281 and 331 of NLC, as to cause of action. The appellant is not pursuing a cause of action against the respondents [sic]. The distinction is like apple and orange and must be appreciated to understand the simple issues involved in this case.

…

[12] Caveats *per se* cannot be equated to a cause of action. It stands only as a statutory injunction to preserve rights which have not been crystallised by due process of law. The law also does not permit a caveat which has been lodged to be sustained if the said rights are not capable of being protected by law for various reasons including laches. Whether it is a private caveat or lien-holder's caveat, etc. it all comes within the limited statutory guidelines set out in the NLC …

[33] Consequently, the Court of Appeal held that in the circumstances of this case, the lien-holder's caveats were no longer sustainable, and therefore the caveats must be removed and the titles returned to the plaintiffs.

At The Federal Court

[34] The defendant applied for leave to appeal to the Federal Court.

Leave Question

[35] On 10 December 2014 this court granted leave to the defendant to appeal on the following question of law:

Can a landowner (equitable Chargor) rely on laches and limitation as a cause of action or ground to obtain a Court Order to remove the lien-holder's caveat under section 331(4) of the National Land Code 1965 instead of applying for redemption under Order 83 of the Rules of the High Court 1980 when the equitable Chargee has been paying the quit rent to preserve the lands from forfeiture?

Appeal

Submissions By The Defendant

[36] Before us, it was submitted for the defendant that limitation cannot be used as a cause of action but only as a defence. The defendant relied on the same case relied upon by the learned Judicial Commissioner in the High Court, namely, the case of *Sakapp Commodities (supra).*

[37] It was also submitted for the defendant that a lien-holder's caveat does not lapse or expire. The defendant relied upon a statement by Gordon Smith J. in *ARRM Arunasalam Chetty Son Of Sithambaram Chetty v. Teah Ah Poh Trading Under The Style Of Mun Seng Hin Kee; Teah Soo Chew Trading Under The Style Of Teah Chin Seng* [1936] 1 LNS 80; [1937] MLJ 17 at p. 23 that "although the personal remedy against the debtor is barred by limitation the security by which the creditor has become an equitable mortgagee is still current and effect can be given to the same".

[38] The defendant further submitted that the Court of Appeal fell into error when it appeared to liken lien-holder's caveats to private caveats, particularly when the judgment of the Court of Appeal reproduces lengthy passages from *Janab's Key to Practical Conveyancing and Islamic Banking* which deal with private caveats, when it referred to the case of *Eng Mee Yong & Ors v. Letchumanan* [1979] 1 LNS 18; [1979] 2 MLJ 212 which deals with the removal of private caveats, and when it referred to the case of *Sayang Plantation Bhd v. Koh Siak Poo* [2006] 1 CLJ 1163 in which the lien had ceased.

Submissions By The Plaintiffs

[39] For the plaintiffs, it was submitted that the defendant is not an equitable chargee as it had a statutory right of lien over the land for which it entered lien-holder's caveats. That being so, it must resort to statutory relief under sub-s. 281(2) of the NLC. It cannot argue that it is an "equitable chargee".

[40] The plaintiffs further submitted that the defendant's right against the plaintiffs as landowners is to recover debt owed to it by the principal debtor. By virtue of s. 21 of the Limitation Act 1953, that right can no longer be exercised 12 years after the date when the right to receive the money accrued. That period must be calculated from May 1989.

[41] The defendant, according to the plaintiffs, has been indolent. The plaintiffs claimed that therefore they are entitled to use delay, laches and limitation as a ground under s. 331(4) of the NLC to remove the lien-holder's caveats.

Analysis

[42] The plaintiffs' application in OS 1161, the present case, is a two-pronged action. The plaintiffs first seek a declaration in para. (a) of the OS that no action can be commenced by the defendant against the plaintiffs in respect of the 54 titles which are the subject matter of the defendant's lien-holder's caveats on the ground that the limitation period had expired. In para. (b), they pray for the cancellation of the two lien-holder's caveats entered on the 54 titles.

[43] Notwithstanding the submissions by the plaintiffs before us, the legal action referred to in para. (a) of OS 1161 must be an application for an order for sale under s. 281 of the NLC. We have highlighted the relevant portions in that paragraph that show the true intent of the plaintiffs in that paragraph.

[44] We agree with the Court of Appeal that an order for sale under s. 281 of the NLC can only be granted where there is already a judgment in respect of the outstanding loan.

[45] As can be seen from the background facts set out above, judgment against Teng Kong, the borrower, was already obtained on 31 May 1989. However, the defendant's application for an order for sale in Originating Summons No. 24-803-2004 was resisted by the plaintiffs on the ground that no judgment had been obtained. Presumably what was meant was that no judgment had been obtained as against the plaintiffs as they were not made parties to the application for the order for sale.

[46] In *Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals* [2008] 2 CLJ 121; [2008] 2 MLJ 622, Abdul Aziz Mohamad FCJ, at p. 674, explained that where the loan is to a third party borrower (as in this case before us) the judgment that must first be obtained before an order for sale can be granted is a judgment against the third party borrower.

[47] We noted that the lien-holder's caveats were in fact registered at the request of Balachandran, who was the lawful attorney of the plaintiffs after judgment was entered against Teng Kong.

[48] Originating Summons No. 24-803-2004 was struck out in 2010. In 2007 the plaintiffs, through their solicitors, made an offer of RM100,000 as full and final settlement of Teng Kong's outstanding judgment sum and interest in order to have the 54 titles released. There is no evidence in the appeal record before us to indicate the reasons for the striking out of Originating Summons No. 24-803-2004. However, the fact remained that in 2007 the plaintiffs, by making the offer to settle the outstanding amount, did acknowledge the debt that is secured by the lien-holder's caveats.

[49] The plaintiffs in the case before us now seek a declaration that the defendant is barred by limitation from exercising its rights under the lien-holder's caveats registered in respect of the 54 titles, and consequent upon that declaration being granted, they seek the cancellation of the lien-holder's caveats.

[50] The defendant's position is that the plaintiffs are using limitation as a cause of action to form a basis for their application for an order for the cancellation of the lien-holder's caveats.

Limitation As A Cause Of Action

[51] In *Sakapp Commodities*, the plaintiff sought a declaration that he (as executor of the estate of one Loo Cheng Ghee) and not the defendant was entitled to a sum of money held in the name of the stakeholders. The plaintiff's claim to the money was essentially based upon the contention that the defendant's claim to the money was barred by limitation. The Court of Appeal said (at p. 825 (CLJ); pp. 660 and 661 (MLJ)):

> Further, it is well established that limitation is merely a defence to an action. It assumes the existence of a cause of action and does not create one. For, as pointed out by Sir Richard Couch, when delivering the advice

of the Board of the Privy Council in *Hari Nath Chatterjee v. Mothurmohun Goswami* [1894] ILR 21 Cal 8 at p 18: "The intention of the law of limitation is not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right". Further, the defence of limitation cannot be relied upon unless specifically pleaded. (See s. 4 of the Limitation Act 1953.)

It is noteworthy that in the present case, limitation is not being relied upon as a defence by either party to the litigation. A reading of the affidavits exchanged before the High Court and the arguments of counsel as recorded by the learned judge make it abundantly clear that the plaintiffs claim to the monies in question is based upon the contention that the defendant's claim to them is barred by limitation. In effect, what the plaintiff is saying is really this: "You (the defendant) cannot have the monies in question because if you bring an action to recover them, your claim will be defeated if I successfully plead limitation. I am therefore entitled to those monies'. Putting aside for a moment the hypothetical element, it is apparent that the plaintiff is in truth relying upon limitation as a cause of action. And this is precisely what the law does not permit.

[52] As we have mentioned above, the Court of Appeal in the case before us was of the view that the declaration prayed for in para. (a) of OS 1161 is not necessary to get the lien-holder's caveats removed as the plaintiffs are "not pursuing a cause of action" against the defendant, and for that reason *Sakapp Commodities* is not relevant to this case.

[53] What is a "cause of action"?

[54] In *Tenaga Nasional Bhd v. Kamarstone Sdn Bhd* [2014] 1 CLJ 207; [2014] 2 MLJ 749 the Federal Court dealt extensively with the meaning of "cause of action". The court referred to various cases in which the term had been defined or discussed. Some of the various definitions are:

(a) "a factual situation the existence of which entitled one person to obtain from the court a remedy against another" (*Letang v. Cooper* [1965] 1 QB 232, at pp. 242-243; *Hock Hua Bank Bhd v. Leong Yew Chin* [1987] 1 CLJ 126; [1987] CLJ (Rep) 126; [1987] 1 MLJ 230; *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321; [1991] 3 MLJ 474; *New Zealand Insurance Co Ltd v. Ong Choon Lin* [1992] 1 CLJ 44; [1992] 1 CLJ (Rep) 230; [1992] 1 MLJ 185; *Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor* [2008] 1 CLJ 651; [2008] 2 MLJ 11, *Lembaga Kumpulan Wang Simpanan Pekerja v. Ong Lian Chee* [2010] 5 CLJ 23; [2010] 4 MLJ 762; *Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd* [2011] 1 CLJ 285; [2011] 2 MLJ 192);

(b) "the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment" (*Stroud's Judicial Dictionary* (5th edn) at p. 378 per Esher MR, in *Read v. Brown* [1888] 22 QBD 128; *Bennett v. White*

[1910] 2 KB 643; *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32; *Loh Wai Lian v. SEA Housing Corp Sdn Bhd* [1984] 2 CLJ 160; [1984] 1 CLJ (Rep) 223; [1984] 2 MLJ 280; *Tuan Haji Ishak Ismail & Ors v. Leong Hup Holdings Bhd & Other Appeals* [1996] 1 CLJ 393; [1996] 1 MLJ 661, *Insun Development Sdn Bhd v. Azali Bakar* [1996] 2 CLJ 753; [1996] 2 MLJ 188, *Goh Joon v. Kerajaan Negeri Johor & Ors* [1999] 5 CLJ 335; [1998] 7 MLJ 621, *Mohamed Yusop Abdul Wahab v. American Express (M) Sdn Bhd* [2002] 7 CLJ 81; [2002] 6 MLJ 507, *The Great Eastern Life Assurance Co Ltd v. Indra Janardhana Menon* [2005] 4 CLJ 717; [2006] 2 MLJ 209);

(c) "that which makes action possible" (*Board of Trade v. Cayzer, Irvine & Co* [1927] AC 610, 617).

[55] In this case, similar to the situation in *Sakapp Commodities*, limitation is not being relied upon as a defence by the parties. The plaintiffs are contending that they are entitled to have the lien-holder's caveats removed because the defendant would be barred by limitation should it seek to recover the outstanding amount of the loan by enforcing its rights under the lien-holder's caveats.

[56] We need to point out that limitation is being used by the plaintiffs in this case as a basis to seek the declaration in para. (a) of their OS, which would in turn constitute the justification for their application in para. (b) for the cancellation of the lien-holder's caveats. Surely that is a cause of action within the definitions given or discussed in the various cases dealt with in *Tenaga Nasional Berhad v. Kamarstone Sdn Bhd* (*supra*). Without a doubt, the plaintiffs, as was the plaintiff in *Sakapp Commodities*, are relying upon limitation as a cause of action.

[57] We are in full agreement with the decision in *Sakapp Commodities* that limitation cannot be used as a cause of action, as is being done in the case before us.

[58] The declaration sought by the plaintiffs in para. (a) of their OS 1161 places the defendant in the peculiar situation of having to show, in resisting the application for the declaration, that if and when it commences an action to enforce its rights under the lien-holder's caveats, that action would not be barred by limitation. It is in this context of resisting the application that the defendant pointed out that there was a fresh accrual of action due to the acknowledgement of indebtedness in 2007 by the plaintiffs.

[59] As for laches, our scrutiny of OS 1161 shows that it is not the plaintiffs' case that the defendant is guilty of laches. As can be seen from the prayers in the OS we have reproduced above, the word "laches" does not even appear. The issue of laches only surfaced in the memorandum of appeal by the plaintiffs to the Court of Appeal. In the memorandum of appeal, the

plaintiffs contended that due to the failure of the defendant to commence an action against the plaintiffs to obtain a valid judgment and thereafter exercise its rights as a lien-holder under the caveats the defendant is guilty of laches and is therefore estopped from commencing such action.

Cancellation Of Lien-holders' Caveats

[60] Under the NLC, a lien-holder's caveat can only cease to exist upon being cancelled under s. 331 in various prescribed circumstances.

[61] Section 331 of the NLC provides as follows:

> Determination of lien-holders' caveats
>
> 331. (1) A lien-holder's caveat may be withdrawn at any time by a notice in writing given to the Registrar by the person or body for the time being entitled to the benefit of the lien, and the Registrar shall cancel the entry of the caveat as soon as may be after the notice is received.
>
> (2) Where any land or lease subject to a lien-holder's caveat is sold pursuant to an order of the Court made by virtue of subsection 281(2):
>
> (a) any certificate of sale presented for registration by the purchaser thereof shall be deemed for the purposes of this Chapter to have been presented with the consent of the lien-holder; and
>
> (b) upon the registration of the certificate, the caveat shall lapse, and the entry thereof be cancelled accordingly by the Registrar.
>
> (3) The Registrar may cancel any lien-holder's caveat upon proof to his satisfaction that all sums due under the lien have been duly paid.
>
> (4) Where the Court is satisfied that any lien-holder's caveat ought not to have been entered, or ought to have been withdrawn, it may order:
>
> (a) the cancellation thereof by the Registrar, and
>
> (b) if the entry of failure to withdraw has caused damage or loss to any person or body, the payment of compensation by the person or body at whose instance the entry was made or, as the case may be, by whom the withdrawal ought to have been effected.
>
> (5) On cancelling the entry of any caveat pursuant to this section, the Registrar shall note on the register document of title the reason for the cancellation and the date thereof; and where any such entry is cancelled by reason of the withdrawal of the caveat, the Registrar shall give notice of the withdrawal to the person or body for the time being entitled to the land or lease formerly affected.
>
> (6) Every cancellation under subsection (5) shall be signed and sealed.

[62] Thus, under s. 331 of the NLC, a lien-holder's caveat can be cancelled by the Registrar:

(a) due to the caveat being withdrawn by the lien-holder;

(b) when the caveat lapses upon the registration of the certificate of sale of the land which has been sold pursuant to a court order under sub-s. 281(2);

(c) if the Registrar is satisfied that all sums due under the lien have been paid; or

(d) if so ordered by the court.

[63] Under sub-s. 331(4) of the NLC, however, the court can only order a lien-holder's caveat to be cancelled under two situations:

(a) where the lien-holder's caveat ought not to have been entered; or

(b) where the lien-holder's caveat ought to have been withdrawn.

[64] Unlike a private caveat (which can lapse under sub-s. 326(1B) or on the expiry of six years from the date it took effect, under sub-s. 328(1) of the NLC), a lien-holder's caveat does not lapse under the NLC except upon the registration of the certificate of sale of the land which has been sold pursuant to a court order.

[65] It is therefore quite unfortunate that the Court of Appeal in this case appears to suggest (as can be seen from the statement quoted in para. 31 above) that a lien-holder's caveat, just like a private caveat, lapses on the expiry of a period of six years from the time it was lodged. It is even more unfortunate that immediately after that statement the Court of Appeal quoted the statement by the Court of Appeal in *Sayang Plantation* that "since a lien-holders caveat has the like effect to that of private caveat, the effect of a private caveat would also apply with equal force to a lien-holders caveat", giving the impression that the above-quoted statement by the Court of Appeal in *Sayang Plantation* was made in relation to the lapsing of a lien-holder's caveat.

[66] Our reading of the judgment of the Court of Appeal in *Sayang Plantation* shows that that case has nothing to do with the lapsing of a caveat.

[67] In *Sayang Plantation*, the lien had ceased to exist because the title deed was no longer held by the lien-holder. It had been returned by the latter upon part-payment being made. However, the lien-holder only withdrew the lien-holder's caveat some five months later. The issue before the court related to the claim for compensation by the registered proprietor for the period between the time the lien ceased to exist and the time the caveat was withdrawn. The court referred to sub-s. 330(5) of the NLC which provides that a lien-holder's caveat has the like effect "as that specified in sub-s. 322(2) to (5) in relation to private caveats". The issue of compensation arose because during the period the lien-holder's caveat remained on the Register, the registered proprietor was prevented from dealing with the land, similar to the effect of a private caveat.

[68] *Sayang Plantation* is a case in which an application was made under sub-s. 331(4) of the NLC for a court order to have the lien-holder's caveat cancelled as it should have been withdrawn immediately upon the cessation of the lien.

[69] A registered proprietor whose land is the subject matter of a lien-holder's caveat is therefore entitled to apply under sub-s. 331(4) of the NLC to have the caveat removed if the ground for such application falls within the ambit of that subsection.

[70] In the case before us, it is not the plaintiffs' pleaded case that the lien-holder's caveats should not have been entered. Their case is that the caveats cannot remain as any action by the defendant to enforce its rights under the lien-holder's caveats would be barred by limitation. In other words, what they say is that the caveats should have been withdrawn, and that would bring their application within sub-s. 331(4) of the NLC.

[71] If the plaintiffs fail to obtain the declaration they seek to obtain under para. (a) of OS 1161, the basis for their application in para. (b) does not exist. The court would be left with no basis to find that the caveats ought to have been withdrawn.

[72] Yet, the Court of Appeal, having decided not to grant the declaration sought by the plaintiffs in para. (a) of OS 1161, proceeded to allow the applications in paras. (b), (c) and (d) of OS 1161.

[73] We have read and re-read the judgment of the Court of Appeal and confess that we are unable to find the basis for the order for the cancellation of the lien-holder's caveats.

[74] The only indication as to the reason for the order for cancellation is found in para. 14 of the judgment of the Court of Appeal. The Court of Appeal states in that paragraph that "the caveats have to be removed if the respondent cannot justify its [sic] presence according to law. The jurisprudence has been set out earlier and needs no repetition". What has been set out under the heading "jurisprudence relating to caveat" in the judgment, as was pointed out by the defendant in its submissions and we agree, is a discussion relating to private caveats, not the removal of lien-holder's caveats. Quite apart from the fact that the Court of Appeal appeared to have overlooked the fact that it was the plaintiffs' burden to show that the caveats cannot remain in the Register, nothing is mentioned in the judgment to enable a conclusion to be made that the defendant cannot justify the presence of its lien-holder's caveats according to law.

[75] In the same paragraph, the Court of Appeal also stated that there are "sufficient authorities to say that once the lien-holder's caveat is not sustainable under the law the court can order the title to be returned to the

registered owner". The following passage from *Perwira Habib Bank Malaysia Bhd lwn. Loo & Sons Realty Sdn Bhd & Anor (No. 2)* [1996] 4 CLJ 179; [1996] 3 MLJ 421 was quoted:

> Since the court had held that the lien-holder's caveat in question was not valid and was unenforceable and the equitable lien did not exist, the appellant was not entitled to retain the title deed. Therefore it was proper for the High Court to order that the lien-holder's caveat be removed by the registrar under s. 331(4)(a) of the code and the issue document of title delivered to the second respondent.

[76] The question which comes to mind is, for what reason can the defendant's lien-holder's caveats be held to be unsustainable? We are unable to find any answer to that question in the judgment.

[77] The case of *Perwira Habib Bank (M) Sdn Bhd v. Loo & Sons Realty Sdn Bhd (No. 2) (supra)* in which the passage quoted in para. 14 of the Court of Appeal's judgment appears actually deals with matters relating to delivery of the title to the subject land consequential upon the decision of the Court of Appeal in *Perwira Habib Bank Malaysia Bhd lwn. Loo & Sons Realty Sdn Bhd & Anor (No. 2)* [1996] 4 CLJ 179; [1996] 3 MLJ 421. In that first *Perwira Habib Bank* case it was held that no valid lien-holder's caveat existed as the title was not deposited by the registered proprietor for the purpose of creating a lien, and no equitable lien existed because the consent of the State Authority had yet to be obtained for the transfer of the land.

[78] It must be remembered that in the case before us, the 54 titles are still held by the defendant as security for the outstanding amount of Teng Kong's loan for which judgment has been obtained but not fully satisfied. The defendant's lien (which had enabled it to enter the lien-holder's caveats under sub-s. 330(1) of the NLC) therefore still continues.

Redemption Under O. 83 Of The Rules Of The High Court 1980

[79] The defendant submitted that the plaintiffs should have proceeded under O. 83 of the Rules of the High Court 1980.

[80] It was submitted for the plaintiffs that they could not proceed under O. 83 as the land is not charged or mortgaged.

[81] The background facts we have set out above show that Wong Kwong Wah and Jamayah bte Haji Osman had in fact in 1998 filed Originating Summons 24-127-1998 in the High Court at Ipoh seeking to redeem the parcels of land in question. Prayer 1 in that originating summons sought a declaration of the amount that ought to be paid for the account of Teng Kong so that the registered owners could "redeem" the 54 titles which are the subject matter of the lien-holder's caveats.

A **[82]** Originating Summons 24-127-1998 was dismissed by the High Court and the appeal to the Court of Appeal was also dismissed.

[83] The plaintiffs had as late as 2007 attempted to "redeem" the titles by making an offer to the defendant. That offer was rejected.

B **[84]** The plaintiffs' position in this OS 1161 is not that the caveats ought to be withdrawn as they are prepared to pay the outstanding amount. At the risk of repeating ourselves, we must emphasise that their position is that even though the defendant still has money owed to it, the defendant cannot enforce its rights under the lien-holder's caveats due to limitation.

C **[85]** In those circumstances, we do not think that O. 83 is of any relevance to this case.

Decision

[86] For the reasons we have discussed above, we therefore are of the view
D that we need to answer only the first part of the leave question, on whether a registered proprietor can rely on limitation as a cause of action or ground to obtain a court order to remove the lien-holder's caveat under s. 331(4) of the National Land Code. Our answer is in the negative.

[87] We, therefore, allow this appeal with costs and set aside the order of
E the Court of Appeal. We reinstate the order of the High Court.

[88] Costs are fixed at RM50,000 subject to allocatur.

[89] The deposit is refunded.

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